

Case In Point

Decision of Private School Not Subject to Judicial Review

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In an important decision on the reach of administrative law, the Court of Appeal for Ontario held that a private school's decision to expel a student for smoking marijuana in his dorm room was not subject to judicial review by the courts.

The private school, Appleby College, is incorporated by a Special Act of the Legislature (the "*Appleby Act*") which provides that the College's Board may confer powers of administration and discipline "as it may think necessary." The power to expel and the criteria for expulsion are not outlined in the *Appleby Act* but instead are determined by the Board.

Student behaviour is governed by the College's Code of Conduct and school policies. When a student is admitted, his or her parents must sign a contract acknowledging that the student must act in compliance with the Code. The Code states that smoking on school property or possessing illegal drugs may result in expulsion, and a separate College policy provides for automatic expulsion where students are found smoking in the College.

Setia was a student at the College. On his final day of grade twelve, he was caught smoking marijuana in a school dormitory and was expelled.

Setia and his parents brought an application for judicial review of the expulsion decision. The Divisional Court held that it had jurisdiction to make an order for judicial review because the College's decision to expel Setia related to "administration and discipline" under the *Appleby Act*, and was therefore a "statutory power of decision." The Court used this as the link to allow for judicial review. A majority of the Court also found that the College breached its duty of procedural fairness by denying Setia and his parents an opportunity to be heard.

The College appealed, and the Court of Appeal overturned the decision. The Court of Appeal found it doubtful that the expulsion decision qualified as the exercise of a statutory power of decision, and found that this was not the kind of public matter which warranted review by the courts. On this point, the Court of Appeal held that "The legislation must authorize the decision-maker to make the decision in question. It is this effecting of the will of the legislature by the decision-maker that gives a sufficient public character to this decision to warrant judicial review."

Even if the expulsion decision constituted the exercise of a statutory power of decision, the Court of Appeal held that the more important question was whether this necessarily meant that it could be reviewed by public law. The relevant considerations in answering this question include:

- the nature of the decision-maker and its responsibilities;
- the decision-maker's relationship to other parts of government or other statutory schemes;
- the character of the matter for which review is sought; and
- the extent to which the decision in question is shaped by private law rather than public law.

In this case, the Court found that there was not a significant public character to the expulsion decision because the *Appleby Act* was not a "law with wide public effect." Further, the expulsion of a private school student only affects those students who attend the College and is more of a private than a public decision. The Court concluded that this decision did not have a sufficient public dimension to which public law remedies could be applied.

It will be interesting to see how this important decision is applied by the lower courts in Ontario in considering the scope of judicial review in cases on the borderline between private and public disputes.

[Setia v. Appleby College, 2013 ONCA 753 \(CanLII\)](#)